No. 13512

United States
COURT OF APPEALS
for the Ninth Circuit

CLAUDE A. TAYLOR,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

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PRELIMINARY STATEMENT

This is a Reply Brief in reply to appellee's brief and is submitted for the purpose of refuting certain statements made by appellee in its brief and for the purpose of explaining certain statements made in appellant's brief to which appellee has taken exception.

Point I

Appellee's statement that "Appellant's only income is derived from and through operation of his trucks" is not supported by any evidence or finding.

ing is contained in paragraph IV-E of the Findings of Fact (Tr. p. 20) and the Court states, referring to the appellant, "He solicits orders for lumber with an express or implied understanding with the customer that he is to arrange for transportation, which defendant performs in his own vehicles." The Court, however, in Finding of Fact No. 1 (Tr. p. 18) has also found that the facts admitted in the Pre-Trial Order are true. Among the admitted facts (Tr. p. 6) is the following: "The defendant is free to use any type of transportation he chooses, either rail, motor carrier or water, if available." Paragraph 12 of the admitted facts (Tr. p. 6) also states that "The delivered price to the purchaser of the lumber sold is established regardless of the method of transportation." Since there is no claim that appellant owns or controls any other means of transportation, it is difficult to see how there is any agreement, express or implied, that the lumber is to be transported in appellant's vehicles. There is no evidence in the testimony or in any of the admissions of the Pre-Trial Order which in any way sustains the implication contained in the above-quoted sentence of paragraph IV-E of the Findings of Fact. It thus appears that, at the very least, the Court's Finding in paragraph IV-E contradicts the Admissions of Fact contained in the Pre-Trial Order and is certainly not sustained by any of the evidence in the record.

Point III

The typographical error contained in appellant's brief referred to in page 26 of appellee's brief does not materially affect the authority of the quotation cited.

Counsel for the appellant sincerely regrets the typographical error which resulted in the omission of the word "if" in the quotation contained in page 19 of appellant's brief. However, the correction does not in any way weaken its authority for the proposition advanced by appellant. It is quite apparent that Commissioner Eastman was being cautious and was trying to distinguish between a bona fide sale and a purported or sham sale wherein none of the elements of a change of title are present. The transaction referred to by the Commissioner in his statement ". . . if that is a bona fide transaction" obviously refers to the transaction of purchase and sale, and even with the word "if" inserted where it should be, it is quite apparent that it was the Commissioner's opinion that if there was a bona fide purchase and sale, the person doing the transporting would be a private carrier. In the case at bar, it is admitted in the words of the Pre-Trial Order, as follows (Tr. pp. 7 and 8, paragraph XIV, Pre-Trial Order):

> "The absolute and bona fide title to the lumber purchased by the defendant passes to the defendant as soon as he takes delivery at the origin mill site and he assumes the responsibility for any damage or loss to the same thereafter until delivery free to sell to others."

Paragraph XII of the Admissions of Fact in the Pre-Trial Order (Tr. p. 8), reads as follows:

> "The defendant assumes all the risks incident to transportation, including acts of God and public enemy."

Paragraph VIII of the Pre-Trial Order (Tr. p. 7), reads as follows:

> "The defendant is free to buy the lumber for which he has an order anywhere he chooses, and may sell the same to other consumers even after the same is purchased by him to fill a specific order."

It is thus apparent that the transaction wherein the appellant purchases the lumber was substantial and real and carried with it all of the elements of change of title, including absolute liability for the price to the supplier whether or not appellant was paid for the lumber by his customer and absolute liability for loss or damage en route. The transaction was thus real and substantial and was the type of transaction the Commissioner had in mind while he was testifying before the Senate Interstate Commerce Committee.

Point IV

The case of Georgia Truck System vs. Interstate Commerce Commission, 123 Fed. (2d) 210, is authority for the position taken by the appellant.

Appellee cites *Georgia Truck System vs. Interstate Commerce Commission,* 123 Fed. (2d) 210, as authority for its position. The appellant has no quarrel with that

case and is heartily in accord with its rationale. The Court in that case found that the transaction of lease was a sham, and in the words of the vernacular, a "phoney". Note 3, at 123 Fed. (2d) 212, indicates quite clearly that the lease transaction referred to in that case was merely a "paper one" and that the actions of the parties belied their words. In the case at bar, there is no such evidence. The appellant took absolute and bona fide title to the lumber from his source of supply, became liable for the price thereof, bore the risk of loss thereof as owner while in the course of transportation, and took the credit risk as seller upon delivery to his customer. No element of sham or evasion was present in any part of the transaction, nor does the appellee claim any. None of the factors present in the *Georgia Trucking* case are present in this case at bar, except the fact that they both relate to motor vehicles.

Point V

For the reasons stated herein and in appellant's main brief the judgment of the District Court should be reversed and the complaint dismissed.

Respectfully submitted,

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